

FILED

JUN 25 2012

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

**SECRETARY, BOARD OF
OIL, GAS & MINING**

IN THE MATTER OF THE REQUEST FOR
AGENCY ACTION OF LIVING RIVERS
FOR AN ORDER VACATING THE
DIVISION'S DECISION APPROVING THE
PERMIT APPLICATION OF RED LEAF
RESOURCES, INC., FOR THE
SOUTHWEST #1 MINE, LOCATED IN
SECTIONS 19, 20, 29, AND 30, TOWNSHIP
13 SOUTH, RANGE 23 EAST, SLBM, AND
SECTIONS 25 AND 36, TOWNSHIP 13
SOUTH, RANGE 22 EAST, SLBM,
UINTAH COUNTY, UTAH.

**ORDER CONCERNING RED LEAF'S
MOTION IN LIMINE**

Docket No. 2012-017
Cause No. M/047/0103

The Board has read and considered the following filings:

1. Request for Agency Action and Request for a Hearing by Petitioner Living Rivers;
2. Red Leaf Resources' Inc's Response to Petitioner's Request for Agency Action;
3. Response of the Utah Division of Oil, Gas and Mining to Request for Agency Action;
4. Living Rivers' Expert Reports, including the May 25, 2012 letter/report from Mr. James R. Kuipers addressed to Rob Dubuc (the "Report");
5. Living Rivers' Prehearing Brief;
6. Red Leaf Resources Inc's Prehearing Brief;
7. Utah Division of Oil, Gas and Mining's Prehearing brief;
8. Red Leaf Resources Inc.'s Motion in Limine ("Motion");

9. Red Leaf Resource's Inc.'s Memorandum in Support of Motion in Limine ("Memorandum");

10. Living Rivers' Memorandum in Opposition to Red Leaf's Motion in Limine ("Opposition Memorandum");

11. Division's Reply to Pre-hearing Briefs and Motions ("Division's Reply");

12. Red Leaf Resource's Inc.'s Prehearing Reply Brief;

13. Response to the Division of Oil, Gas and Mining's and Red Leaf's Prehearing Briefs;

14. Petitioner's Response to the Division's Reply to Prehearing Briefs and Motion;

NOW THEREFORE, the Board, having considered the above-listed filings, and good cause appearing, hereby rules upon Red Leaf's Resources Inc.'s Motion in Limine as follows:

I. Opinions regarding risk of technical failure of project.

As to the first of four separate subjects on which it seeks to exclude Mr. Kuipers' opinion testimony, Red Leaf seeks an order prohibiting his testimony "regarding [the] purported 'significant risk of both technical and economic failure' of Red Leaf's EcoShale In-Capsule technology." Memorandum at 1.¹

As an initial matter, Red Leaf contends that Mr. Kuipers is not qualified by either education or experience to offer opinions on these issues.² Although Mr. Kuipers holds a B.S. degree in Mineral Process Engineering and has more than 28 years of experience in the mining

¹ This section of the Order addresses the admissibility of Mr. Kuipers' opinions concerning the risk of technical failure of the project. Mr. Kuipers' opinions concerning the risk of economic failure of the project are addressed in the following section, below.

industry and mining environmental compliance, Red Leaf contends that Mr. Kuipers' training and experience relate to base and precious metal extraction rather than oil shale, and that he has no specific experience related to the proposed In-Capsule Technology. Memorandum at 6.

Living Rivers notes that because the technology to be used by Red Leaf has not been previously demonstrated and no prior example of a similar capsule retort design exists, it is not possible for any expert to have specific experience with that technology other than individuals involved in Red Leaf's project (and presumably even those individuals had no such specific experience prior to commencing their work on the subject project for the company). Opposition Memorandum at 5. Despite his lack of specific experience with Red Leaf's new In-Capsule Technology, the Board finds under Utah Rule of Evidence 702 that based on his education as a mining engineer and decades of experience as outlined in his Report and in the Opposition Memorandum (including experience with bentonite amended soil liners, *see* Opposition Memorandum at 6 and 8), Mr. Kuipers is sufficiently qualified as a threshold matter to offer opinions regarding technical design aspects of the subject project. The Board finds that opinion testimony on this subject will aid it in understanding the evidence and determining facts at issue. The Board therefore denies the Motion to the extent it is based on alleged limitations of Mr. Kuiper's qualifications to offer opinions on the technical design issues. Beyond this threshold question, to the extent Red Leaf contends that the limitations of Mr. Kuipers education or experience render his opinions less reliable than those of Red Leaf's experts, the Board will determine the weight to be placed on those opinions at the hearing.

² Although it supports the Motion as to some of Mr. Kuipers opinions on other topics (see below), the Division takes no position on the admissibility of his opinions on the technical design issues. Division's Reply at 7.

Red Leaf also argues that education and experience aside, Mr. Kuipers' opinions lack a reliable and relevant basis because the methods he employs and analogs he refers to in his Report are not sufficiently relevant or applicable to the particular project at issue. In making this argument, Red Leaf notes that Mr. Kuipers, in conducting his review, did not evaluate data or information from any design comparable to Red Leaf's. Memorandum at 7. Again, due to the lack of any examples of similar capsule retort designs, Living Rivers argues that Mr. Kuipers appropriately used analogs and applied his knowledge and experience with respect to those analogs in order to evaluate the proposed project. Opposition Memorandum at 6. Based on its review of the Report and the parties' briefs, the Board is persuaded that the opinions Mr. Kuipers offers are, as a threshold matter, sufficiently supported by reliable and relevant facts, data and methods to be admissible under Utah Rule of Evidence 702. To the extent Red Leaf contends that the limitations of Mr. Kuipers methodology or the analogs he relies upon render his opinions less reliable than those of Red Leaf's experts, the Board will determine the weight to be placed on those opinions at the hearing.

II. Opinions regarding likelihood of project failure and proponent bankruptcy.

Red Leaf seeks an order barring admission of opinion testimony from Mr. Kuipers concerning the likelihood that the Red Leaf project will fail economically, as well as the likelihood of the company's filing for bankruptcy. Memorandum at 7-8. In general, Mr. Kuipers' resume discloses relevant background and experience in performing cost-estimation and analyzing other economic issues. As noted by Red Leaf and the Division, however, Mr. Kuipers' Report does not indicate that he made any analysis of Red Leaf's financial situation nor of any process-specific financial information that would provide a basis for his opinion on these issues.

Memorandum at 8; Division's Reply at 7. The Board agrees that the Report does not disclose an adequate basis for Mr. Kuiper's opinions on these issues and therefore grants the Motion as it relates to such opinions. The Board also agrees that the likelihood of the economic failure of the project and/or likelihood of operator bankruptcy are not relevant to any issue raised in the Request for Agency Action (or to any analysis the Division must undertake in approving the permit), and Mr. Kuiper's opinion testimony on these topics is therefore not helpful to the Board under Utah Rule of Evidence 702 and is inadmissible under Utah Rule of Evidence 402.

III. Opinions regarding adequacy of the reclamation bond.

Red Leaf and the Division argue that Mr. Kuipers' opinions regarding the adequacy of the reclamation bond or the amount by which it should be increased are not relevant to any issue raised by Living Rivers. Memorandum at 8-9; Division's Reply at 8. The Board agrees that the adequacy of the reclamation bond was not raised in the Request for Agency Action and Mr. Kuipers' opinions on that issue are irrelevant and unhelpful. The Board therefore grants the Motion with respect to such opinions.

The Board notes that the Request for Agency Action does challenge the reclamation plan (as opposed to the adequacy of the bond required to secure performance of reclamation) and that Living Rivers alleges that reclamation cannot be properly accomplished. Request for Agency Action at 26. To the extent Mr. Kuipers' opinions pertain to those issues (as opposed to the adequacy of the bond), they are not excluded.

IV. Opinions having their basis in the 2012 Draft PEIS.

Red Leaf and the Division ask the Board to exclude any opinion testimony having as its basis the 2012 Oil Shale and Tar Sands Programmatic Environmental Impact Statement

(DPEIS). Memorandum at 9; Division's Reply at 8. Red Leaf argues that the DPEIS does not specifically pertain to the subject project or the EcoShale In-Capsule technology at issue, and also argues that in any event, the DPEIS is a draft document subject to change prior to finalization. Memorandum at 9-10.

Although Red Leaf asserts that the DPEIS cannot form the basis for any opinions concerning the "technical or economic viability" of the project at issue, Mr. Kuipers' Report appears to rely on the DPEIS primarily for the limited proposition that oil shale is a potential source of contaminants such as salts, metals and hydrocarbons. Report at 5. The Board is persuaded, however, that because the DPEIS is a draft document, it cannot be relied upon as a basis for Mr. Kuipers' opinion. The Board therefore grants the Motion as it relates to opinions having their basis in the 2012 Draft PEIS.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

DATED this 25th day of June, 2012.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING


James T. Jensen, Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing ORDER CONCERNING RED LEAF'S MOTION IN LIMINE for Docket No. 2012-017, Cause No. M/047/0103 to be mailed with postage prepaid, this 26th day of June, 2012, to the following:

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Utah Business Search - Registered Principals

Registered Principals

Name	Type	City	Status
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